IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-01945-REB

OREGON-CALIFORNIA TRAILS ASSOCIATION, a nonprofit corporation;
WESTERN NEBRASKA RESOURCES COUNCIL, a nonprofit corporation;
HANGING H EAST, L.L.C., a limited liability corporation;
WHITETAIL FARMS EAST, L.L.C., a limited liability corporation;

Petitioners,

v.

NOREEN WALSH, in her official capacity as the Regional Director of the U.S. Fish and Wildlife Service; DAVID BERNHARDT, in his official capacity as the Secretary of the U.S. Department of the Interior; AURELIA SKIPWITH, in her official capacity as Director of the U.S. Fish and Wildlife Service;

Respondents, and

NEBRASKA PUBLIC POWER DISTRICT,

Respondent-Intervenor.

INTERVENOR NEBRASKA PUBLIC POWER DISTRICT'S ANSWERING BRIEF

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APE	Area of Potential Effects
AWBP	Aransas-Wood Buffalo Population
BLM	Bureau of Land Management
BiOp	Biological Opinion
DEIS	Draft Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FWS	U.S. Fish and Wildlife Service
HCP	Habitat Conservation Plan
ITP	Incidental Take Permit
kV	Kilovolt
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPPD	Nebraska Public Power District
Service	U.S. Fish and Wildlife Service
SHPO	State Historic Preservation Officer
SPP	Southwest Power Pool
USGS	U.S. Geological Survey
WEST	Western EcoSystems Technologies

I. Introduction

Intervenor Nebraska Public Power District (NPPD) is constructing the "R-Project," a new 345 kV transmission line that will run north from south-central Nebraska to a new substation in Thedford, and then east to connect with an existing transmission line in eastern Nebraska (*see* map on p.6, *infra*). Two of the important purposes for this Project are increasing grid reliability and reducing grid congestion. Because the R-Project will cross habitat of the endangered American burying beetle, NPPD sought an Incidental Take Permit (ITP) under the Endangered Species Act (ESA) from the U.S. Fish and Wildlife Service (Service).

Petitioners oppose the Project and present a range of inconsistent arguments, trying to transform a suite of federal environmental and cultural resources statutes into substantive local land-use and facility siting laws, which they are not. The record shows that the Service properly complied with all of its statutory obligations under the ESA, National Environmental Policy Act (NEPA), and National Historic Preservation Act (NHPA). Because NPPD met all the substantive requirements for an ITP, the ESA required the Service to issue the permit.

Petitioners tellingly devote substantial effort to what the ITP does *not* cover—the whooping crane. In doing so, Petitioners highlight the flaw in their challenge—a misapprehension of the Service's scope of authority in this voluntary permit for American burying beetle impacts. Petitioners seek an expanded scope for the applicant-driven permit process, arguing that a different ESA-listed species, the whooping crane, will strike the R-Project transmission line. On the law, Petitioners concede that they have no on-point decision for this unprecedented expansion of the Service's authority. On the facts, Petitioners' novel argument relies on a report roundly

criticized in the record by qualified reviewers as reaching implausible conclusions. The Service conducted its own carefully documented analysis determining that it was not reasonably certain that even one whooping crane would strike the R-Project over its 50-year life.

Petitioners' arguments about other ESA-listed species are unfounded. Petitioners provide no evidence contradicting the Service's well-reasoned conclusion that the Project will not affect two of those species—the least tern and piping plover. As to the American burying beetle, Petitioners overlook the Service's careful record responses to each of their identified concerns, and they skip past the key fact that the impacts to the beetle are fully offset by the mitigation measures in NPPD's Habitat Conservation Plan (HCP).

While Petitioners argue that the Service should have further considered alternate Project route locations, none of the statutes they cite provides the Service routing authority when addressing an ITP application. And the alternatives Petitioners propose do not meet the R-Project's purpose and need, are more costly, and would involve further delays for NPPD customers, adversely affecting regional electrical transmission reliability and capacity—put simply, further increasing costs to NPPD ratepayers while also increasing the risk of localized blackouts.

Finally, Petitioners' position that the Service should have done more to evaluate the potential impacts of potential wind energy development is wrong. Again, Petitioners seek to stretch the scope of the Service's review impermissibly to encompass largely undefined wind energy projects that are neither reasonably foreseeable nor within the Service's jurisdiction or control. These wholly separate wind energy projects, to the

extent they may occur, will not be caused by and are not effects of the Service's R-Project ITP.

The Court should deny the Petition for Review and uphold the Service's decisions. Doing so will allow NPPD to rely on the properly issued ITP and approved HCP to address the effects to American burying beetle from the R-Project's construction, operation, and maintenance. This in turn supports the public interest in the beetle and other species' conservation benefits while also providing much needed improvements to the transmission grid for electrical customers in Nebraska and beyond.

II. Statement of Facts

NPPD adopts the Federal Respondents' Factual Background. Answering Brief of Federal Respondents [#34 at 7-17].[1] The following factual discussion provides additional details relevant to NPPD's arguments and addresses certain misstatements in Petitioners' Opening Merits Brief [#22].

A. The Scope and Purpose of the R-Project.

In January 2012, the Southwest Power Pool (SPP), a regional transmission organization responsible for ensuring the reliability of the electrical grid across all or a portion of 14 states, identified the need for the R-Project "chiefly to provide access for wind development in Cherry Co.," but also to provide parallel paths in Nebraska for west-to-east electrical flows, relieve congestion, increase transfer capability, and mitigate reliability concerns. LIT_CITED_026788 (2012 Integrated Transmission Plan).[2]

[1] [#34] is an example of the convention this brief uses to identify the docket number assigned to a specific filing by the Court's case management and electronic case filing system.

[2] This brief uses the same administrative record documents citation format as the Federal Respondents' brief. *See* [#34] at 10 (ECF pagination).

In April 2012, SPP issued to NPPD, one of its members, a Notice to Construct the R-Project for these purposes. This Notice established key routing requirements for the R-Project. The new 345 kV transmission line was to extend from NPPD's Gerald Gentlemen Station substation north to a new 345 kV substation in Cherry County, then eastward to a new 345 kV substation in Holt County where it must interconnect with the Western Area Power Administration's existing Fort Thompson to Grand Island 345 kV transmission line located on Holt County's eastern border. *See* NEPA_000041-43 (2012 Notice to Construct).

Just a few months later, severe drought conditions caused increased irrigation power use in north-central Nebraska. NPPD's transmission system could not keep up, and NPPD was forced to lease expensive mobile generators to ensure farmers were not left without power. NEPA_002443 (Analysis of Public Comments). These summer 2012 conditions revealed the vulnerability of Nebraska's transmission grid, which SPP studied in a targeted analysis. EMAIL_008927 (SPP letter). This analysis showed that the grid reliability and congestion concerns are sufficiently dire that the R-Project should be constructed regardless of the regional renewable energy growth potential. NEPA_002443. It also prompted SPP to re-prioritize grid reliability and congestion relief as primary R-Project purposes, *id.*, and to issue a new Notice to Construct to address these concerns by identifying Thedford (in Thomas County), rather than Cherry County, as the new transformer midpoint location. EMAIL_006821 (2014 Notice to Construct).

Providing transmission access for renewable energy projects in Nebraska remains one of the three Project purposes. LIT_CITED_032211, 32213-14 (FEIS). However, to the extent wind energy is developed in Nebraska, it will be as separate

projects, proposed by separate developers, on different timeframes, and outside NPPD's control. In the Final Environmental Impact Statement (FEIS), the Service explained that wind energy development generally was "reasonably foreseeable" in the region, but that, other than the Thunderhead Wind Energy Center, other projects were not sufficiently concrete to be analyzed in detail. LIT_CITED_032746-47. And even if no new wind energy project were ever built, NPPD would still construct the R-Project to address the critical issues of grid reliability and congestion relief. NEPA_002443 (Public Comments Analysis).

B. NPPD's Route Selection Process.

NPPD used a four-part public process to refine the R-Project's route, consistent with the key route determinants mandated by the SPP's Notices to Construct. LIT_CITED_032225 (FEIS). Contrary to Petitioners' assertion [#22 at 13, 26], NPPD invited the Service's and Nebraska Game and Parks Commission's input at each phase of this process. LIT_CITED_016894, 016901, 016910, 016925 (Routing and Environmental Report).

First, in 2012, NPPD delineated the study area, encompassing approximately 7,039 square miles. LIT_CITED_032225-32226 (FEIS). *Second*, in January 2013, NPPD held a first round of meetings and solicited public comments to identify study corridor locations. LIT_CITED_016894 (Routing and Environmental Report). Based on public input, data collected on the study area, and NPPD's set of approximately 50 routing criteria, NPPD identified siting opportunities and constraints to develop study corridors. LIT_CITED_016894-901.

Third, in September 2013, NPPD presented the study corridors to community leaders, agencies, and the general public in a second round of meetings to identify

potential route alternatives. LIT_CITED_016901. Considering those public comments, NPPD identified over 2,000 miles of potential route links, which it systematically evaluated applying its routing criteria and public input to create five end-to-end alternative routes. LIT_CITED_016903, 016910. *Fourth*, in 2014, NPPD presented these alternatives in a third round of public open houses, held additional landowner meetings, identified its proposed route, and held public hearings. LIT_CITED_016910, 016918, 016925. NPPD announced its final route in January 2015, shown below. LIT_CITED_016925.

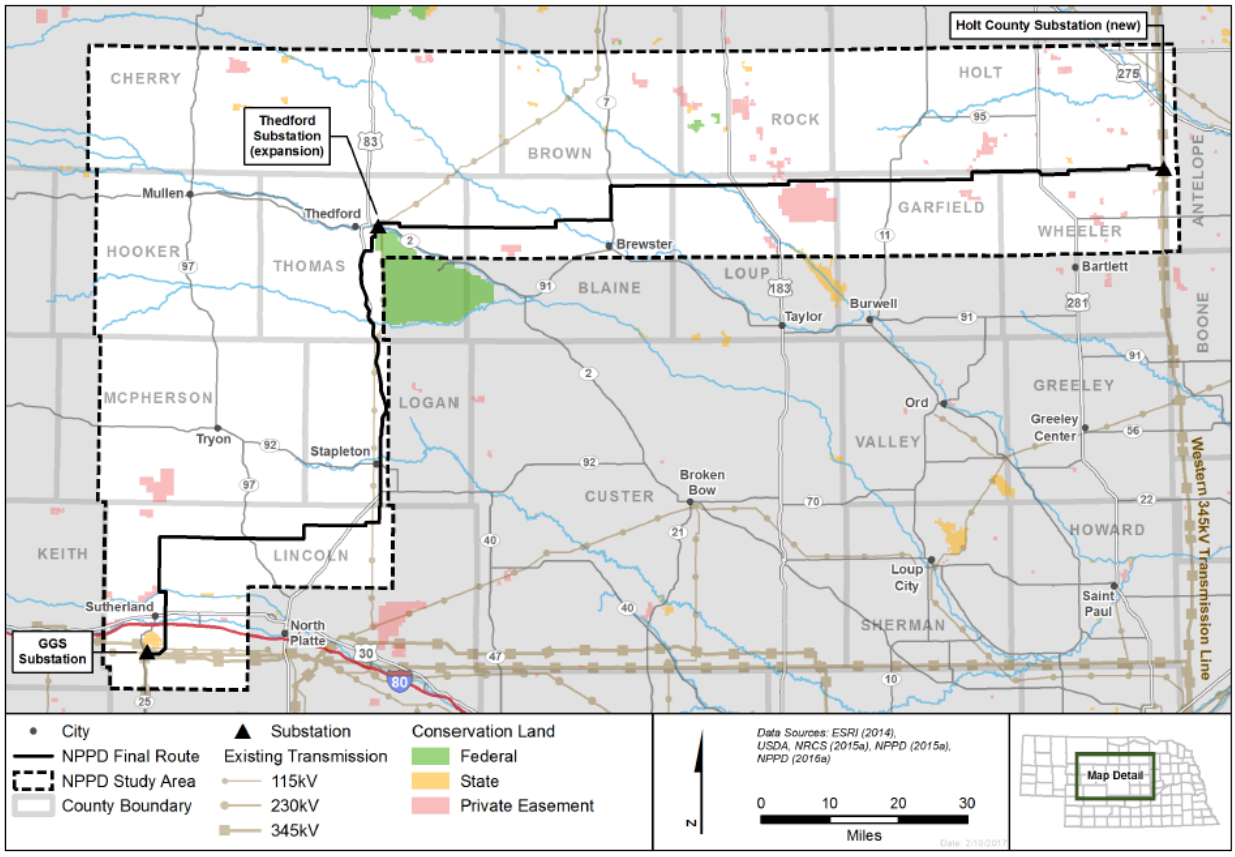

Figure 1-1. Nebraska Public Power District's R-Project Study Area and Final Route

Source: LIT_CITED_032205 (FEIS)

C. The Incidental Take Permitting Process.

Because the R-Project elements required in the Notices to Construct overlapped with American burying beetle habitat, NPPD initiated the ITP process with the Service for that species. LIT_CITED_032219 (FEIS). Two parts of the Service's incidental take permitting consideration are discussed below: alternative routes and whooping crane impacts.

1. The Service's Consideration of Alternative Routes.

Despite the Service's recognition that it lacked any routing authority for the R-Project, the Service decided it would consider potential alternative routes in the Draft Environmental Impact Statement (DEIS) for "comparison purposes only." EMAIL_001984 (meeting summary).

The Service identified three potential conceptual alternative routes: the Northern, Central, and Southern.[3] LIT_CITED_032268-77 (FEIS). The Northern Route was dismissed due to its greater length, higher costs, and greater beetle impacts. LIT_CITED_032269. The Southern Route was similarly dismissed due to its increased length, higher costs, and greater impacts. LIT_CITED_032271. After additional consideration, the Service ultimately determined that the Central Route should also be eliminated. The Service explained that its authority under ESA Section 10 is limited to authorizing a permit for the applicant-proposed route; it has no authority to require route modifications. LIT_CITED_032276. Further, the Central Route does not meet the R-Project purpose and need because it is inconsistent with NPPD's routing principles

[3] All of these alternatives were outside NPPD's study area, which must be approved by the Nebraska Power Review Board. LIT_CITED_032935-37 (FEIS App. B).

and prudent utility practices, would cause significant delays, and would cost an additional $38 million, while still being located in American burying beetle habitat. LIT_CITED_032276-77. *See also* CORRESPONDENCE_000855-57 (NPPD's DEIS comments explaining that the Central Route would be longer, be located in areas at greater risk of ice storms and tornadoes, assumed an incorrect terminus 20 miles short of the SPP-required end point, and would increase the cost to rate payers by $65 million if the correct terminus were applied).

2. Consideration of Whooping Crane Impacts.

a. Project Design Elements to Minimize Whooping Crane Impacts.

The Service's analysis of whooping crane impacts was first informed by NPPD's commitments to adopt best practices. NPPD agreed to follow the Service's Region 6 Guidance for Minimizing Effects from Power Line Projects Within the Whooping Crane Migration Corridor. LIT_CITED_032463 (FEIS). This Guidance states that a project applicant should mark with bird flight diverters those segments of a proposed transmission line located within one mile of potentially suitable whooping crane habitat and an equal number of miles of existing transmission line within one mile of potentially suitable habitat. NEPA_000025 (Region 6 Guidance).

NPPD concluded, after appropriate study, that of the 288,000 acres within one mile of the R-Project line, 3% of that was suitable habitat, and 123 miles of the 225-mile line were within one mile of such potentially suitable habitat. EMAIL_001610 (NPPD Habitat Assessment); HCP_001735 (HCP). NPPD agreed to mark those 123 miles of the R-Project and—contrary to proposed amici Center for Biological Diversity et al.'s assertion [#26-1 at 13]—an additional 123 miles of existing line. LIT_CITED_032463

(FEIS). The Service also explained why burying portions of the R-Project, as suggested by the Region 6 Guidance, was infeasible and would result in increased effects on the American burying beetle. LIT_CITED_032265-68.

b. The Service's Approach to Whooping Crane Impacts.

At the time of the Service's decision, in more than 60 years of documented research there have been only 10 known whooping crane-power line collisions, and only one of those was with transmission line. HCP_001739 (HCP). Thus, there are very limited available data to assess that risk. EMAIL_000501-04 (NPPD Risk Assessment). The Service nonetheless devoted substantial resources to assessing the R-Project's risk to whooping cranes. Personnel within the Service differed in their approaches, and the record reflects those agency deliberations over time. The key points are summarized below:

- **2013:** The Service agreed that the HCP and ITP coverage of the whooping crane would not be warranted if NPPD agreed to follow the Region 6 Guidance. EMAIL_000303 (meeting minutes).
- **March 2016:** The Nebraska Field Office recommended that NPPD include the whooping crane in the HCP as a covered species because "it is quite conceivable that take could occur . . . from a number of different sources (helicopter flushing cranes, collision with power lines, disturbance that impacts feeding, breeding and sheltering etc.)." EMAIL_004199 (Service comments on draft HCP). The Field Office did not quantify the risk of take.
- **June 2016:** After meetings on the Field Office's position, the Service agreed that the whooping crane would not be a covered species in the HCP, but

NPPD would agree that, if a whooping crane were to collide with a similarly situated transmission line after the issuance of the ITP, it would seek an ITP amendment to cover the crane. EMAIL_005472-75 (meeting minutes).

- **May 2017:** In the DEIS, the Service explained that that whooping crane was not proposed to be a covered species because the draft HCP concluded that "the likelihood of whooping crane collisions with the R-Project transmission line would be extremely low, resulting in a risk value of less than one collision over the 50-year life of the Project. The Service conducted a separate whooping crane collision risk assessment that also concluded the risk of whooping crane mortality from collision with the R-Project transmission line would be low" and mitigation measures would further reduce the risk. ADD_00381-82. While acknowledging uncertainty due to limited data, the Service concluded that "it is more likely than not (a low bar for confidence) that no strikes will occur." ADD_00915 (DEIS App. E).
- **May 2018:** The Field Office developed its "Rationale for Inclusion of the Whooping Crane as a Covered Species in the [ITP] for the R-Project Transmission Line in Nebraska," relying partly on the flawed Ecosystems Advisors report (*see* Sections II.C.2.c. & IV.B.1, *infra*). EMAIL_009607.
- **July-September 2018:** The Field Office proposed preparing another whooping crane risk assessment using the Ecosystems Advisors report (after clarifying math errors in the report) and suggested that Dr. Joe Skorupa in the Regional Office agreed with that approach. EMAIL_010855. Dr. Skorupa did not, writing:

> I had not envisioned using the Gil and Weir [Ecosystems Advisors] analysis in any way as a template for our new analysis. **The independent peer reviewer identified multiple fatal flaws in the Gil and Weir approach and I fully agree with the reviewer's findings.** Furthermore, when I read Gil and Weir I was frankly taken aback by the high volume of careless errors in the report and the authors' inability to present their analysis in a manner that would meet the basic scientific standard of providing sufficient information for a reader to independently confirm the work (a problem the independent peer reviewer also ran into).

EMAIL_010853-54 (emphasis added). Nevertheless, the Field Office collaborated with proposed amicus curiae Center for Biological Diversity and with Ecosystems Advisors to prepare another risk analysis,[4] which it provided to the Regional Office on September 10, 2018. WHCR_000372. This analysis concluded that there was "an expected take of 40-84 whooping cranes over the 50-year life of the R-Project" using two different methodologies. WHCR_000373.

- **September 25, 2018:** NPPD met with the Regional Office and was informed that the remaining work on the permitting process would be handled by the Regional Office rather than the Nebraska Field Office. Contrary to Petitioners' assertions [#22 at 22], NPPD played no role in the Regional Office's decision to complete the work on the permit application.[5]

[4] The Field Office exchanged numerous emails with Jared Margolis of the Center for Biological Diversity, as well as Gil and Weir, regarding the substance of its risk analysis between July 6 and September 14. *See, e.g.,* EMAIL_010207-13, 010307, 010308, 010482-87, 010512-25, 010528-40, 010555-67, 010651-68, 011093-94, 011097-98, 011182-84, 011766-70.

[5] Finalization of an ITP process involving an EIS always involves the Regional Office; the Regional Director is the putative approval signature authority for an ITP issuance. Service Manual 730 FW 1, Responsibilities and Delegations of Authority for Native

- **December 2018:** Dr. Skorupa and Lara Juliusson in the Regional Office's Branch of Division Support reviewed the Field Office's September 10, 2018 whooping crane analysis. WHCR_000396-413. They found numerous errors in the scientific methodology and assumptions used. Applying two different approaches that were based on the "reasonably certain knowledge" that the Service has regarding whooping cranes and transmission lines, they estimated that, without any bird flight diverters, 0.58 cranes would collide with the R-Project over its 50-year life. WHCR_000409. They also noted that "[t]he telemetry data does not appear to be a 'game-changer' for risk assessment. This is probably because the telemetry data does not shed any new light on AWBP[6] intrinsic strike-rates, the single most important parameter controlling the outcome of risk assessments."[7] WHCR_000410.
- **January 2019:** On January 30, 2019, the Service prepared its "Review and Critique of Risk Assessments Considered by the U.S. Fish and Wildlife

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Endangered and Threatened Species, § 1.3.C(1) (the Regional Director "[m]ay issue, renew, amend, transfer, deny, suspend, or revoke all ESA permits"), available at https://www.fws.gov/policy/730fw1.html. The Regional Director cannot delegate this authority to the Field Office in this situation. *Id.*

[6] AWBP stands for the Aransas-Wood Buffalo Population, the population of whooping crane that uses the migratory corridor through Nebraska.

[7] The Service also noted that, although only roughly 10 percent of whooping crane mortalities have a known cause, "it is not uncommon to encounter statements about the importance of power-line strikes to [whooping cranes] as if they are statements of proven fact; but as a matter of pure science, nothing could be further from the truth. The relative importance of power-line strikes compared to other sources of post-fledging AWBP mortality simply remains a scientific unknown." WHCR_000407 (emphasis in original). Thus, Petitioners' and amici's repeated assertions implying that power-line collisions are the greatest threat to whooping cranes suggest a level of certainty that does not exist.

> Service Regarding the Collision Risk for Whooping Cranes with NPPD's R-Project" (2019 Critique). That review evaluated the ten whooping crane analyses provided during the permitting process. It stated that "after careful review of outside analyses and multiple internal assessments, **the Service was ultimately able to conclude that incidental take of whooping cranes is not reasonably certain to occur due to collisions with the power lines in the R-Project**." WHCR_000183 (emphasis added). As to the Field Office's September 10 analysis (referred to as Service (2018b)), the 2019 Critique states that "Flaws identified included, but were not limited to: 1) a number of assumptions in Service (2018b) were not correctly applied; 2) relevant literature was excluded; and 3) a number of statistical and mathematical errors were made. **All these errors resulted in [the Field Office's analysis making] a significant overestimation of whooping crane collision risk over the 50-year life of the R-Project.**" WHCR_000186 (emphasis added).

c. Ecosystems Advisors Analysis.

Proposed amicus curiae Center for Biological Diversity, with its comments on the DEIS and draft HCP, submitted to the Service an analysis by Ecosystems Advisors (sometimes referred to by the authors' names, Gil and Weir). CORRESPONDENCE_001064, 002797-835. This report, which provided the basis for the Field Office's 2018 analysis, is the primary support for Petitioners' argument that the R-Project will take whooping cranes.

Ecosystems Advisors used raw data (i.e., no quality control or quality assurance) (EMAIL_007844) from a whooping crane satellite-tracking study by the U.S. Geological

Survey (USGS) from 2009 and 2014. Ecosystems Advisors predicted that the R-Project may take as many as 4.46 whooping cranes *per year* (or up to 223 cranes over the life of the project). CORRESPONDENCE_002799. The Ecosystems Advisors analysis was critiqued by multiple reviewers.

First, NPPD engaged Headwaters Corporation, an environmental and statistical consulting firm that had participated in the USGS tracking study, to summarize the data and compare them to the Ecosystems Advisors' effort. LIT_CITED_018360 (HCP, App. C); WHCR_000347-70. Headwaters was unable to replicate the 1,334 whooping crane use locations in the R-Project area as defined by Ecosystems Advisors. It concluded that Ecosystems Advisors must have included the less precise Doppler locations in its analysis, despite the exclusion of these data by USGS published research due to the average ± 2.5 miles range of error. WHCR 000347, 000354, 000360.

NPPD also engaged Western EcoSystems Technologies (WEST) to review the Ecosystems Advisors report. WHCR_000318-45. WEST identified numerous issues, including:

- With one exception, the Ecosystems Advisors telemetry data analyses and modeling efforts were not explained in enough detail to be repeated;
- There was a strong possibility that Ecosystems Advisors performed quick and inaccurate analyses that were not peer reviewed;
- Ecosystems Advisors overestimated the calculated habitat area;
- Ecosystems Advisors made additional arithmetic errors;
- Ecosystems Advisors claimed that "the historical sighting data, as well as the telemetry data, indicate that cranes show site fidelity along the central flyway,"

WHCR_000324, but it provided no substantiated information to determine how they reached this conclusion, and Headwaters' own quantitative analysis did not support Ecosystems Advisors' claims regarding crane site fidelity; and

- Ecosystems Advisors consistently used an outdated statistic for the percentage of whooping crane mortality associated with the non-wintering time period, resulting in much higher (yet unsubstantiated) estimates of predicted mortality, and making it impossible to assess whether the calculations leading to the Ecosystems Advisors' results were correct. WHCR_000318-36.

The Service engaged Dr. Craig Davis to evaluate the Ecosystems Advisors report, NPPD's risk analysis, and the Service's DEIS risk analysis. WHCR_000282-305 (Davis Report).[8] Dr. Davis raised similar concerns as WEST on the Ecosystems Advisors report, which were far more than "modest" as Petitioners assert [#22 at 23]:

- He questioned the validity and logic of the Ecosystems Advisors' model parameters, stating that "the calculations used to ultimately arrive at their parameter estimates appeared to be incorrect or flawed and often times, provide estimates that are not biologically relevant and misleading." WHCR_000296.

[8] Dr. Davis also critiqued aspects of NPPD's risk analysis, and NPPD addressed those items in its revised final HCP analysis. HCP_001843-53; WHCR_000187. For the Service's risk assessment, Dr. Davis concluded that "[o]verall, the [Service] analysis showed that there is tremendous uncertainty with estimating the risk of power line collisions for whooping cranes in the R-Project area." Although the Service might have used other information, "[u]ltimately, I think they would have come to the same conclusion . . . ." WHCR_000302.

- He questioned Ecosystems Advisors' suggestion that observations of flocks of as many as 21 individuals arriving at the same wetland could indicate that all the birds are related and that using the wetland is an inherited tradition, noting that that statement was highly speculative and not supported by any peer-reviewed literature. WHCR_000295.
- He also concluded that Ecosystems Advisors' annual collision mortality rate estimate in the R-Project area was an overestimation—it attributed the cumulative mortality over 27 years to a single year: "Clearly, the circular nature of this exercise in which we begin with 101 mortalities over a 27 year period and end with 101 mortalities on an annual basis is flawed and misleading." WHCR_000297.
- Because the report did not provide any supporting materials or justification, Dr. Davis could not discern what value Ecosystems Advisors used for the mean power line collisions per year or the basis for the estimate that 10% of the annual mortality occurs in the Nebraska Sandhills Ecoregion. *Id.*

Finally, in the 2019 Critique, the Service made its ultimate judgment on the Ecosystems Advisors report. Citing many of the same flaws identified by Headwaters, WEST, and Dr. Davis, the Service concluded that the report is "not reliable" and did not qualify as the "best available" data. WHCR_000187.

III. Statutory and Regulatory Framework

NPPD adopts the Federal Respondents' Statutory and Regulatory Background. [#34 at 3-7].

IV. Argument

A. Standard of Review.

NPPD adopts the Federal Respondents' Standard and Scope of Review. [#34 at 17-19].

B. Because the R-Project is Not Likely to Adversely Affect the Whooping Crane, the Service Complied with ESA Sections 7 and 10.

Petitioners argue that the Service underestimated the R-Project's impacts on the endangered whooping crane and therefore violated ESA Section 7 and 10. But the premise of Petitioners' argument is incorrect. The Service undertook a careful and exhaustive evaluation of scientific opinion regarding the Project's impacts on whooping cranes. After that evaluation and relying only on reasonably certain knowledge, the Service concluded that, even without the considerable risk reduction achieved through the use of bird flight diverters, the R-Project has the potential to "take" only 0.58 whooping cranes over the 50-year life of the project. WHCR_000409. Thus, the Service concluded that it is not reasonably certain that even one whooping crane will be taken by the R-Project.[9] The Service fulfilled its ESA Section 7 and Section 10 obligations regarding the crane in light of this record-documented remote risk of take.

[9] The Service appropriately determined that take of the whooping crane is not reasonably certain to occur. Thus, Petitioners' and proposed amici's arguments about potential jeopardy to the species are inapposite. *See* [#22 at 38-39]; [#26-1 at 11,16]. Moreover, the record contradicts Petitioners' assertions that the loss of a single crane would result in jeopardy. *See* LIT_CITED _31674 (describing a 2004 population viability analysis that concluded that an additional 3% annual mortality would preclude recovery; at the current population of 505 cranes, that would equate to an additional mortality of 15 cranes per year).

1. The Service Used the Best Available Information to Determine the Risk of Whooping Crane Take.

As noted above, when the Service was preparing to make a final decision on NPPD's ITP application, it was presented with a wide range of predictions across ten formal analyses and rebuttals regarding the Project's potential impact on whooping cranes. *See* WHCR_000183-88 (2019 Critique). These predictions had shifted somewhat over time as the parties considered additional data. *Id*. As of fall 2018, there were three primary approaches before the Service:

- NPPD's methodology predicted take ranging from 0.022 to 0.22 whooping cranes over the life of the project. WHCR_000190.
- Ecosystems Advisors predicted take ranging from 85 to 223 whooping cranes over the life of the project. *Id*.
- The Field Office, relying on the Ecosystems Advisors report,[10] predicted takes ranging from 15 to 155 whooping cranes over the life of the project. WHCR_000189.

The ESA requires the Service to use the best available scientific and commercial data. 16 U.S.C. § 1536(a)(2); *see also* [#34 at 25-26]. Thus, presented with this disparity in analyses, the Regional Office's first priority was determining whether each analysis satisfied that standard. The Regional Office did so in its 2019 Critique, the definitive record document on whooping crane risk. WHCR_00183-455.

The Regional Office rejected both the Ecosystems Advisors' methodology and the Field Office's analysis, which relied in part on the Ecosystems Advisors' approach:

[10] *See* EMAIL_010855 (email from Eliza Hines in the Field Office to Mike Thabault in the Regional Office).

"based partially on [the Davis Report] and our analysis in Service (2018c), we conclude that the Ecosystems Advisors (2017) and Service (2018b) analyses are ***not reliable and did not incorporate the best available science***." WHCR_000187 (emphasis added). Thus, contrary to Petitioners' assertions, this is not a case of agency supervisors overriding the line officials' work. *See* [#22 at 1, 25-26]. Instead, qualified Regional Office staff were compelled to correct serious errors in the Field Office's work to ensure that the agency complied with the ESA's requirements.

Petitioners rely heavily on the Field Office's analysis. *See* [#22 at 18-25, 31-35]. But they do not acknowledge the Regional Office's legitimate, record-based critiques explaining that the Field Office's work did not meet the ESA's requirement to use the "best available scientific and commercial data." 16 U.S.C. § 1536(a)(2). The Field Office used two methodologies, both of which the Regional Office rejected. The Regional Office concluded that the Field Office made three "significant fatal flaws" in the first method that, if corrected, yielded a predicted take of 0.46 whooping cranes over the life of the project—"two orders of magnitude less" than estimated by the Field Office.[11] WHCR_000186.

These differences between the Regional Office and Field Office are not merely good faith differences of opinion. The Field Office based its work on patently incorrect assumptions. For example, the assumption that there is one whooping crane collision for every 20.69 miles of power line in the migration corridor leads to absurd results when applied broadly. "[T]he approximately 45,000 miles of transmission lines in the

[11] The Service's 2019 Critique, with its detailed assessment, belies Petitioners' assertion that the Service's final decision "ignores" the Field Office's analysis. *See* [#22 at 1].

U.S. portion of the 95% AWBP migration corridor . . . would cause 2,175 strikes per year!!" This means that, given that the entire population is estimated to be 505 individuals, each of those individuals "would have to be killed more than 4 times in the same year." WHCR_000399. Because the whooping crane population is growing[12] and has not been extirpated by existing power lines, the Field Office's assumptions and methodology (the same ones advocated by Petitioners and proposed amici curiae Center for Biological Diversity et al.) are implausible.

The Field Office's second method received worse criticism. The Regional Office "was unable to completely follow the train of logic" for the calculations because it results in the wrong unit ("strikes per mile of stopover radius") that "for the remainder of the analysis [the Field Office] erroneously treats . . . as if it were the unit (number of) strikes (collisions)!"). WCHR_000405-06.

Using "reasonably certain knowledge" and transparently explaining all assumptions, the Regional Office estimated the annual additional risk posed by the R-Project, without the risk mitigation achieved through bird flight diverters, to be 0.0038775 whooping cranes, and, over the 50-year life of the project, 0.58 whooping cranes. WHCR_000408-09.[13]

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[12] *See* LIT_CITED_018253 (HCP) (whooping crane populations increased from 18 in 1938 to 505 in 2018).

[13] The proposed amici's arguments about the lawfulness of the HCP's adaptive management section [#26-1 at 14-16] are both incorrect and irrelevant to the Service's scientific and record-based conclusion about the likelihood of crane take. *See also* [#34 at 24 n.9]. The proposed amici assert that this is not a new argument because Petitioners reference one Service official's view of this HCP approach in the Petitioners' background statement of facts in the opening brief. *See* [#35 at 2] (citing [#22 at 19]). But this passing reference in a background factual description does not raise a legal claim or support legal argument that the HCP adaptive management section

Petitioners do not identify any information the Service failed to consider. Although they claim that the Service should have considered telemetry data, they fail to acknowledge that the Service did consider those data and concluded that they did not meaningfully add to the key question before the Service—i.e., the risk of a crane striking a transmission line. WHCR_000410; *see also* NEPA_002366 (Analysis of Public Comments) ("The Service incorporated the satellite location data and found that the risk assessment yielded the same results as methods derived without incorporating the satellite location data (USFWS 2018b)."). This conclusion was consistent with Dr. Davis' suggestion that incorporating the telemetry data would likely have little effect on collision risk results. WHCR_000187, 000302; *cf. Indigenous Envt'l Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 586 (D. Mont. 2018) (where plaintiffs failed to show how the whooping crane telemetry data would change the agency's analysis, the agency's failure to consider it is not arbitrary and capricious).

Petitioners are disappointed that the Service's experts rejected the methodology of the analysis they financed. That the Service did so—and even that the Service overruled preliminary determinations by some Service personnel—does not render the Service's conclusion arbitrary and capricious. *See* [#34 at 19-21 and cases cited therein]; *see also WildEarth Guardians v. NPS*, 703 F.3d 1178, 1186-87 (10th Cir. 2013) ("a diversity of opinion by local or lower-level agency representatives will not preclude the agency from reaching a contrary decision, so long as the decision is not arbitrary and capricious and is otherwise supported by the record"). The record demonstrates

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violates the ESA. Thus, the Court need not address that new claim from proposed amici. And if addressed, the claim lacks adequate record support.

why the Service rejected nonsensical methodologies that produced absurd results. Not only does the Service have the discretion to adopt a methodology of its choosing, *see Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 782 (10th Cir. 2006), it has an obligation under the ESA to use the best available scientific and commercial data. Because the Service found that Petitioners' preferred methodology did not meet that standard, it appropriately did not rely on it.

2. Section 10 Coverage is Not Appropriate for Remote Risks of Take.

Petitioners claim that the Service violated Section 10 by not requiring the HCP to cover the whooping crane. But that argument is based on an incorrect legal construct. Petitioners imply that a Section 10 permit is mandatory, failing to acknowledge that courts and the Service agree it is not. *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 928 (9th Cir. 2000) ("pursuing an ITP is not mandatory and a party can choose whether to proceed with the permitting process."); ADD_02506 (HCP Handbook) ("seeking an incidental take permit is a voluntary action"). Thus, the Service cannot compel an applicant to include a particular species in an HCP.

The Service does, however, *recommend* that an applicant cover a listed species in its HCP when take is "reasonably certain" to occur. ADD_02506 (HCP Handbook); *see also id.* ("Note that if incidental take of ESA-listed species is not anticipated . . . an [ITP] is not needed or appropriate. Avoid processing applications submitted purely 'as insurance' when take of ESA-listed species is not anticipated").[14]

[14] The part of the HCP Handbook cited by Petitioners [#22 at 31], is consistent with the rest of the Handbook, requiring take to be "likely." The proposed amici seem to argue that an applicant can choose not to cover a species only when there will be "no effect" to that species. [#26-1 at 17]. However, that position is inconsistent with their own

The Service's use of a "reasonably certain" standard for when an ITP may be advisable is appropriate. It is consistent with the degree of certainty courts require before imposing injunctive relief for future ESA Section 9 take violations. *See, e.g.*, *Marbled Murrelet v. Pacific Lumber Co*., 83 F.3d 1060, 1066 (9th Cir. 1996) (an injunction under Section 9 can issue based on "[a] reasonably certain threat of imminent harm to a protected species"). The same standard applies in the analogous context of an incidental take statement issued in an ESA Section 7 consultation process (which provides an exception from the Section 9 take prohibition for incidental take associated with federal agency actions). The courts and the Service agree that the Service cannot issue an incidental take statement unless take is reasonably certain to occur. *See Arizona Cattle Growers Ass'n v. FWS*, 273 F.3d 1229, 1243 (9th Cir. 2001); 50 C.F.R. § 402.14(g)(7) (the Service has the responsibility to issue an incidental take statement "if such take is reasonably certain to occur."). Thus, the Service appropriately recommends that an applicant seek take coverage in an ITP only when take is sufficiently certain to occur. Conversely, the Service appropriately issues an ITP that does *not* cover species for which take is not reasonably certain to occur.

As the Federal Respondents explain, Petitioners' reference to *Kokechik Fisherman's Ass'n v. Secretary of Commerce,* 839 F.2d 795 (D.C. Cir. 1988) is unavailing. *See* [#34 at 23-24]. In that case, decided under the Marine Mammal Protection Act, the record showed that up to 450 fur seals could be taken annually, rendering it a "certainty" that take would occur. *Kokechik,* 839 F.2d at 801-02. To the

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citation to the HCP Handbook, which recommends that the applicant include all listed species "that are expected to be taken." *Id*. at 17 n.13 (citing ADD_02576).

extent Petitioners' claim that *Kokechik* addressed the mere probability of take [*see* #22 at 32-33], they misstate the facts of the case. In contrast, here the Service determined that take was not "reasonably certain." WHCR_000188. The Service's position is rational and consistent with the applicable legal framework.

3. The Service Properly Concluded that Formal Section 7 Consultation Is Not Required for Remote Risks of Take.

Consistent with the ESA, the Service conducted an "intra-Service" consultation regarding the potential impacts of issuing the ITP on listed species within the affected area. If the Service concludes that the proposed action is not likely to adversely affect a species, formal consultation is not required for that species. 50 C.F.R. § 402.13(c). A proposed action is likely to adversely affect a species when incidental take of that species is anticipated. U.S. Fish and Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at E-12 (1998) ("Consultation Handbook").

As to whooping cranes, the Service determined that the ITP (and related construction and operation of the R-Project) could result in "minor, temporary disturbance" but that "adverse effects to [the] species are not anticipated due to: (1) the avoidance of the species' suitable habitat[;] (2) the low likelihood for any disturbance that may occur as a result of HCP implementation; [and] (3) the application of Avoidance/Minimization Measures." SECTION_7_000035, 000040 (Biological Opinion (BiOp) transmittal). The Service also concluded that a whooping crane striking a power line in the R-Project is not reasonably certain to occur. SECTION_7_000037. Thus, the Service properly determined that the R-Project was not likely to adversely affect the whooping crane.

As with their Section 10 arguments, Petitioners dispute the Service's conclusion that take of a whooping crane is not reasonably certain to occur. They argue that "common sense" alone is enough to demonstrate that a whooping crane will strike the R-Project.[15] [#22 at 35-36]. With 45,000 miles of transmission lines in the U.S. portion of the whooping crane's migratory corridor and only one recorded whooping crane transmission line strike in over 60 years, common sense instead indicates that the risk is minimal. But the agency did not rely on "common sense." It applied expert analysis to reach its best estimate of the likelihood of a strike over the life of the project and found that take is not reasonably certain to occur. The Service carefully and exhaustively analyzed this risk and came to a reasoned conclusion. The Court should reject Petitioners' invitation to substitute their judgment for the agency's. *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006).

Petitioners' arguments about extending the benefit of the doubt to the species [#22 at 36-39] are similarly misguided. *First*, the "benefit of the doubt" language from the ESA's legislative history (which was not incorporated into the statute) prohibits the Service from abdicating its responsibility to evaluate the impacts of a proposed action simply because the best available information is uncertain. *Miccosukee Tribe of Indians of Florida v. United States*, 566 F.3d 1257, 1267-68 (11th Cir. 2009); *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 362 (N.D. Cal. 2007) (reconciling cases by concluding that they both stand for the proposition that, under the "benefit of the

[15] The Center for Biological Diversity et al. proposed amici appear to be making a similar argument that the risk is self-evident. [#26-1 at 3, 10].

doubt" principle, "the agency must carefully examine the available scientific data and models and rationally choose the most reliable").

Second, even if the Service were required to give the species the benefit of the doubt when there is a "tie" or a "close call" in the evidence, that is not the case here. As the Federal Respondents note, the "benefit of the doubt" does not relieve the agency of its obligation to use the best available scientific and commercial data. Nor does the "benefit of the doubt" require the Court to adopt predictions produced by deeply flawed methodologies over the Service's reasoned best estimate. *See* [#34 at 29-31 and cases cited therein].

C. The Service's Treatment of Other Species Complied with the ESA.

1. The Service Appropriately Concluded that the R-Project was Not Likely to Adversely Affect the Least Tern and Piping Plover.

The Service concluded that the ITP (and related construction and operation of the R-Project) was not likely to adversely affect either the interior least tern or the piping plover. SECTION_7_000036 (BiOp transmittal). The Service explained that "[m]inor, temporary disturbances to migratory individuals at North Platte River and South Platte River crossings during construction and maintenance activities is [*sic*] possible, but unlikely" and the likelihood of impacts from power line collisions is "minimized to a level that is discountable" with the implementation of avoidance and minimization measures. *Id*.

Without providing any evidence, Petitioners contend that the Service's conclusion that the R-Project is not likely to adversely affect least terns and piping plovers is not supported by the best scientific and commercial data available and that any uncertainty must be resolved in favor of listed species. [#22 at 33-36]. But, as noted above and by

the Federal Respondents, the Service is charged with identifying and applying the "best available" scientific data. *See* Section IV.B.1, *supra*; [#34 at 25-26, 29-30]. Petitioners cite only to the FEIS and a case discussing the Service's findings regarding the effects of an offshore wind project in Massachusetts on the roseate tern and piping plover. [#22 at 33-36] (citing *Pub. Employees for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016)). The Service's specific findings for that project in the marine environment off the coast of New England are irrelevant to the analysis of a land-based electrical transmission project in Nebraska, and the FEIS supports the Service's not likely to adversely affect determination.

The FEIS explained that there is no nesting habitat for either species present in the study area, no terns have been documented in the study area, and piping plovers have only been documented in the study area during the 1992 migration. LIT_CITED_032451, 032454. There are no reported piping plover mortalities and only one tern mortality from transmission line collisions in Nebraska. LIT_CITED_032452, 032455; HCP_001746, 001749 (HCP). Contrary to Petitioners' assertion that terns and plovers are "very susceptible to transmission line collisions," [#22 at 40] (citing LIT_CITED_32451-55 (FEIS)), the FEIS determined that tern and plover mortality from line collisions is unlikely because both the tern and plover are agile flyers able to easily avoid transmission lines in most cases. LIT_CITED_032452; *see also* WHCR_000303; HCP_001746-47, 001749 (HCP). The R-Project's mitigation measures further avoid any potential effects on the tern and piping plover. LIT_CITED_032453.

The Service considered the best available scientific data and rationally concluded that the R-Project is "not likely to adversely affect" either the interior least tern or piping

plover. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 998 (D.C. Cir. 2008) (The "best available data" requirement does not require conducting new studies, it "merely prohibits the Secretary from disregarding *available* scientific evidence that is in some way better than the evidence he relies on.") (*quoting Sw. Ctr. for Biological Diversity v. Babbitt,* 215 F.3d 58, 60 (D.C. Cir. 2000)). Petitioners fail to show otherwise.

2. The Service Appropriately Considered and Responded to Comments on the Analysis of the American Burying Beetle.

Petitioners contend that the Service failed to consider the best available science by not addressing Dr. Jon Bedick's comments regarding the American burying beetle. But the Service directly responded to the substance of Dr. Bedick's comments in its DEIS Analysis of Public Comments, and the concerns he raised were addressed in the FEIS, BiOp, and HCP. *See, e.g.*, NEPA_002362-63 (Analysis of Public Comments); LIT_CITED_032481-87 (FEIS); Section_7_00018-26 (BiOp); HCP_001706-12, 001773-75 (HCP).

In its DEIS comments, proposed amicus Center for Biological Diversity attached comments from Dr. Bedick regarding the R-Project's impacts on American burying beetles. CORRESPONDENCE_003112-26. The Service responded to Dr. Bedick's comment questioning the reliability of the Service's beetle density estimate and the supporting surveys, explaining: (1) "The density estimate is based on the 99th percentile of current and historical trap data that were collected inside and outside the permit area and that met specific survey requirements identified by the Service" and (2) "Annual beetle surveys associated with the R-Project are ongoing to verify the take estimate is accurate and would not be surpassed." NEPA_002362; *see also* Section_7_00025-26 (BiOp) (explaining that using the 99th percentile of the collected data accounted for

"annual [American burying beetle] population fluctuation and to reduce the risk of underestimation"). Refuting Dr. Bedick's contrary assertion, the Service explained that the "take estimate calculation does not assume the beetles are equally distributed across the landscape but rather assumes that all impacts would occur in areas with the highest 1 percent of beetle density ever recorded" and that this approach calculates the highest take number that may occur from construction, regardless of actual habitat quality. NEPA_002362; *see also* Section_7_00025 (BiOp).

The Service also directly addressed Dr. Bedick's concerns regarding construction related impacts, explaining how the FEIS analysis accounted for impacts on the beetle from construction activities, including soil compaction, and the fact that beetles are active at night. *See, e.g*., NEPA_002362-63 (Analysis of Public Comments); LIT_CITED_032481-87 (FEIS); *see also* HCP_001769-72 (HCP).

These direct responses and the discussions in the FEIS and BiOp adequately address the concerns Dr. Bedick raised. Therefore, this situation is distinguishable from *Sierra Club v. Van Antwerp*, 661 F.3d 1147 (D.C. Cir. 2011). There, the court remanded the agency's determination regarding a project's impacts on the indigo snake because the agency failed to consider the effects of habitat fragmentation despite a species expert raising the issue and the project proponent's acknowledgement of the species' vulnerability to habitat fragmentation. *Id.* at 1156-57. By contrast, there are no significant concerns raised by Dr. Bedick that the Service failed to consider. *Cf. Sierra Club v. EPA*, 925 F.3d 490, 497–98 (D.C. Cir. 2019) ("[A] failure to respond to comments is significant *only insofar as* it demonstrates that the agency's

decision was not based on a consideration of the relevant factors.") (quoting *Sierra Club v. EPA*, 353 F.3d 976, 986 (D.C. Cir. 2004)).

D. Petitioners Do Not Identify Any Unexamined Route Alternative Requiring Detailed Consideration.

Petitioners raise arguments about the Service's treatment of alternative routes under NEPA, the ESA, and the NHPA. None has merit.

1. NEPA Does Not Require Additional Analysis of Route Alternatives.

NEPA does not require federal agencies to consider alternatives that they have "in good faith rejected as too remote, speculative, or . . . impractical or ineffective." *WildEarth Guardians v. NPS*, 703 F.3d 1178, 1183 (10th Cir. 2013) (quoting *Custer Cty. Action Ass'n v. Garvey,* 256 F.3d 1024, 1039 (10th Cir. 2001)). Thus, "[a]lternatives that do not accomplish the purpose of an action are not reasonable, and need not be studied in detail." *Id*. (quoting *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.,* 297 F.3d 1012, 1031 (10th Cir. 2002)). Instead, agencies must only "briefly discuss the reasons for eliminating unreasonable alternatives from an EIS." *Id*. (internal quotations omitted).

In the Tenth Circuit, courts apply the "rule of reason" to determine whether an EIS analyzed sufficient alternatives to allow the agency to take a hard look at the available options. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 709 (10th Cir. 2009). The reasonableness of alternatives is measured against two guideposts. First, "an alternative is reasonable only if it falls within the agency's statutory mandate." *Id*. Second, "reasonableness is judged with reference to an agency's objectives for a particular project," which is generally expressed in the purpose and need to which the agency is responding in the EIS. *Id*. at 709 & n.30.

Here, the FEIS thoroughly explains why the Central Route was eliminated from detailed consideration. *First*, under *Richardson*, the Central Route does not fall within the Service's statutory mandate when reviewing an HCP and ITP application. As noted in the FEIS, the Service "does not have authority to require NPPD to alter the proposed route or select a different one if the permit application meets all of the permit issuance criteria." LIT_CITED_032276; *see also Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 217 (D.C. Cir. 2013) (agency properly rejected alternatives it lacked the authority to impose); *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 842 (9th Cir. 2013) (same).

Second, the Central Route would not meet the purpose and need of the R-Project. LIT_CITED_032276-77. That is so because the Central Route

> is inconsistent with NPPD's routing and siting principles and prudent utility practice, and it would cause significant delays and be far more costly than the proposed route. It also has an eastern terminus that is inconsistent with the SPP Notice.
>
> Because the central route would be 17.9 miles longer than the proposed route, it would be inconsistent with NPPD's routing tenet to minimize impacts on landowners and costs to ratepayers. Additionally, more of the central route would be within areas of greater risk of ice storms, which would negatively impact reliability.

LIT_CITED_032276 (citation omitted).

Petitioners do not argue that the Service failed to document its reasons for eliminating the Central Route alternative from detailed consideration in the FEIS. Instead, Petitioners challenge the reasons that the Service cited, but without providing any contrary or better information to indicate that those record-supported reasons were insufficient under NEPA to support the Service's decision.

For instance, Petitioners seek to substitute their judgment for the agency's by claiming that the additional cost and delay factors are insufficient to determine that the Central Route would not meet NPPD's purpose and need. [#22 at 49-50]. Petitioners' cost argument is based on their own assessment of the relative economic impact of the additional cost. It also relies on their assertion, based on statements in a 2014 Nebraska Power Review Board order, that NPPD would—although paying "for all of the initial capital constructions for the proposed project"—recover some of those costs from other SPP member utilities and ratepayers "over the depreciated life of the project," (NEPA_000385-86), which is 50 years (LIT_CITED_032258 (FEIS)). Ultimately, after a half-century, and following cost recovery from the other SPP members, NPPD would have paid approximately seven percent of the project costs. *See* [#22 at 12, 49]; NEPA_000386.

Petitioners appear to argue that the overall cost of an alternative is immaterial to economic practicability because other regional and in-state ratepayers will foot part of the bill. Regardless of the cost-sharing arrangement, the additional costs to be borne by NPPD, other Nebraska ratepayers, and other SPP utilities and ratepayers are real. One hundred percent of the additional costs will have to be paid by ratepayers, and thus are an appropriate consideration to determine whether an alternative is reasonable.[16] *See* 43 C.F.R. § 46.420(b) (Department of the Interior NEPA regulations) (reasonable alternatives must be "technically and economically practical or feasible and meet the

[16] *See* EMAIL_003101 (NPPD response to Service alternatives: "[o]ne of the most basic tenets of routing a transmission line is to minimize the impacts on landowners and costs to ratepayers").

purpose and need of the proposed action"); *see also* LIT_CITED_032276-77 (minimizing costs to ratepayers is one of NPPD's routing criteria).

Next, Petitioners claim that scheduling issues—which go directly to the need for the project and increased reliability and transmission capacity as identified in the record—"cannot be a lawful basis for deeming an otherwise viable option to be infeasible for NEPA purposes." [#22 at 49-50]. Petitioners cite no authority for this position. Instead, Petitioners argue that because NPPD has adopted temporary power supply and transmission mitigation measures (since the R-Project has been delayed beyond its in-service need date of January 2018),[17] these measures have "sufficiently mitigated this impact" and could be applied for any alternative route to ameliorate the effects of further scheduling delays. *See* [#22 at 49-50]. Petitioners are wrong. The Service considered these mitigation items and noted their limited efficacy. They do not sufficiently address the region's electrical reliability standards, and they impose significant costs. *See* LIT_CITED_032215-16 (FEIS). As noted in the FEIS: "Any further delay in the R-Project construction will greatly expand the local mitigation needs . . . which will result in local area reliability issues for customers served in this north-central Nebraska area." LIT_CITED_032216. As the FEIS further explains:

> These temporary mitigation measures impose significant costs to NPPD customers and increase the risk of potential localized blackouts if certain critical transmission outages were to occur. Finally, localized mitigation plans would no longer be effective for some future projected load levels; at that time, additional alternative transmission facility plans

[17] These temporary measures include renting mobile diesel generators, renting a mobile 115 kV capacitor bank, load shedding, and other measures. LIT_CITED_032215-16 (FEIS).

> would need to be constructed to meet the mandatory NERC reliability standards.

LIT_CITED_032215-16.

As the potential delay or need for further approval goes directly to the project applicant's purpose and need, it is a permissible consideration under *Richardson* and the NEPA caselaw to determine the need for detailed consideration of a particular alternative. *See Richardson*, 565 F.3d at 709 ("reasonableness is judged with reference to an agency's objectives for a particular project"); *City of Bridgeton v. FAA*, 212 F.3d 448, 457 (8th Cir. 2000) (upholding agency's rejection of an airport alternative that would entail delayed capacity benefits and interference with hubbing operations).

The authorities relied on by Petitioners are distinguishable. In *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999), a federal agency proposed to exchange federal lands for private lands. *Muckleshoot* addressed alternatives for federal land management decisions over which the agency had considerable discretion and authority. *See id.* at 813-14. Here, the Service evaluated the ITP for the specific R-Project located on private lands where the Service's jurisdiction and discretion are limited—the Service must issue the ITP if the statutory criteria are met. Thus, *Muckleshoot* was a narrow, fact-based decision and does not require a contrary result.

While *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016), involved consideration of an ITP, the proposed alternatives there were not location-based as Petitioners want here. Instead they were different methods for operating the applicant-proposed wind project in the same location. *Id.* at 575-76. Petitioners have not identified any economically viable operational or construction method alternatives

for the R-Project. They have identified only different locational routing that was already addressed by the Service in the EIS process, determined not to be a reasonable alternative, and does not require detailed FEIS analysis.

Richardson actually supports the Service's position. In *Richardson*, the Tenth Circuit carefully evaluated the standard and reasons why BLM might have had to consider the challenger's proposed alternatives. While the Tenth Circuit held that BLM should have considered an alternative closing all of Otero Mesa to fluid minerals development, the court also held that BLM was not required to consider alternatives that are unreasonable in light of the project's purposes. Therefore, in *Richardson* BLM was not required to consider an alternative to manage the Otero Mesa as wilderness study areas. 565 F.3d at 712-13. Similarly here, the Service documented that the Central Route alternative is not reasonable in light of NPPD's purpose and need and is beyond the Service's statutory authority to require. Thus, it was not a reasonable alternative under NEPA.

2. The Service Documented That the R-Project Would Fully Offset the Impacts of the Section 10 Authorized Taking, and No Routing Alternative Was Required Under ESA Section 10.

Petitioners contend that the Service's decision violated ESA Section 10, alleging that the R-Project route may not minimize and mitigate the take of American burying beetle (or other listed species) to the maximum extent practicable. *See* [#22 at 40-44]. But Petitioners' argument is based on three flawed legal premises: (1) that Section 10 requires a minimization and mitigation of impacts to ESA-listed species that are not included in the coverage of an ITP (and for which no take is authorized); (2) that the requirement to minimize and mitigate the impact of the taking to the "maximum extent practicable" authorizes the Service to consider alternative locations; and (3) that even

where the effects to a covered species are fully offset (meaning completely mitigated so that the biological value to be lost from covered activities is fully replaced through implementation of conservation measures), the Service must consider whether that minimization and mitigation is "the maximum extent practicable." As explained by the Federal Respondents and discussed below, the ESA does not require what Petitioners assert. *See* [#34 at 38-41].

First, the Section 10 minimization and mitigation requirements do not apply to the whooping crane, least tern, and piping plover. Those species are not covered under the ITP, and no take of those species is authorized by the Service. Thus, there is no corresponding requirement for such take to be minimized and mitigated to the maximum extent practicable. *See* [#34 at 38 n.14]. Petitioners' argument is premised on an expansion of that ESA Section 10 standard to non-covered species, without citing any authority to justify straying beyond the statute's plain terms. *See* [#22 at 40-41]. For the same reason, Petitioners' contentions about a possible underground transmission line [#22 at 41], are inapplicable. Petitioners say an underground transmission line might "decrease potential impacts on migratory birds," but that is not an ESA Section 10 issue.[18] No taking of any bird is authorized by the NPPD ITP.

Second, as to the beetle, the Petitioners claim the Service violated Section 10 because the conceptual Central Route discussed (but not carried forward for detailed consideration) in the FEIS would cross less beetle habitat. But this ignores how the ESA's "maximum extent practicable" standard works. Because the Service lacks

[18] The Service also explained why burying portions of the transmission line was infeasible and would result in increased adverse effects to the American burying beetle. LIT_CITED_032265-68.

routing authority, it cannot require an applicant to relocate a project to satisfy that standard. ADD_02564 (HCP Handbook) ("Ultimately, the applicant chooses whether to design their project to avoid take or to include certain activities for take coverage."); *cf.* 50 C.F.R. § 402.14(i)(2) (when a project does not result in jeopardy, the Service's reasonable and prudent measures in a BiOp cannot alter the location of the project).

Petitioners' reliance on *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002) [#22 at 44], is unavailing. The alternative at issue there was a different design located on the same property, *id*. at 185, not a wholesale relocation of a 225-mile transmission line that the Service lacks the authority to require.[19] Petitioners cannot provide any support for their position that the "maximum extent practicable" standard authorizes the Service to compel an applicant to undertake the proposed action in a completely different location.

Third, it is well established that once the applicant has provided sufficient minimization and mitigation measures to fully offset the impact of the taking, the Service need not consider whether any additional minimization or mitigation is practicable. *Union Neighbors*, 831 F.3d at 583 ("[I]f combined minimization and mitigation fully offset the take, it does not matter whether [the permittee] *could* do more; [the permittee] has already satisfied what is required under the ESA."). Based on this principle, the D.C. Circuit questioned the applicability of *Gerber* when the impacts of the taking are fully offset. *Id*. at 584. Because NPPD has fully offset impacts to the beetle here (NEPA_002416-17), which the Petitioners do not dispute, whether the Central Route

[19] Petitioners' citation to *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274 (E.D. Cal. 2000), cited in [#22 at 44], is similarly unhelpful. That case involved the amount of conservation fees to be charged, not different locations for the proposed action. 128 F. Supp. 2d at 1293. Further, the impacts of the taking were not fully offset. *Id*. at 1292 (noting that HCP preserved only 0.5 acres for every 1.0 acre developed).

alternative is viable is irrelevant to the "maximum extent practicable" standard. NPPD satisfied that standard, and the Service's record analysis confirmed that. No more is required.[20]

3. The NHPA Does Not Require an Analysis of Route Alternatives.

Petitioners argue that the NHPA required the Service to consider routing alternatives to avoid or minimize effects to historic properties. [#22 at 52-53]. But unlike NEPA, the NHPA does not require a review of "alternatives to the proposed action." *See* 42 U.S.C. § 4332(C)(iii). Rather, the NHPA merely requires the agency to "take into account the effect of the undertaking" on historic sites. 54 U.S.C. § 306108 (Section 106); *see also Lesser v. City of Cape May*, 110 F. Supp. 2d 303, 328 (D.N.J. 2000) ("neither NHPA nor the regulations impose upon [the agency] a duty to consider alternative sites for construction or completely different . . . proposals") (citation omitted), ***aff'd***, 78 F. App'x 208 (3d Cir. 2003).

To the extent alternatives are generally referenced in the NHPA regulations, those can be no broader than the alternatives considered under NEPA and must be similarly constrained by notions of feasibility and project purpose and need. *See Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001) (noting "operational similarity between the two statutes" before applying NEPA concepts to address NHPA issues). For the reasons discussed in Section IV.D.1, *supra*, the Service adequately considered alternatives here.

[20] Even if an analysis of alternative routes were appropriate under Section 10, the Service fully explained its rejection of the Central Route. *See* Section IV.D.1, *supra*; LIT_CITED_032276.

E. Wind Energy Projects, to the Extent They Are Reasonably Foreseeable, Are Separate Actions or Undertakings and Were Properly Considered for Their Cumulative Effects.

Petitioners argue that the Service's analysis of the ITP's effects should have encompassed not only the impacts of the R-Project itself, but also those of the Thunderhead Wind Energy Center and other undefined wind energy projects that Petitioners argue will be "caused by," and therefore be indirect effects of the R-Project. [#22 at 45-48, 50-51, 53]. Petitioners' arguments implicate their ESA, NEPA, and NHPA claims, and all turn on the proper scope of the analysis, which itself depends on the definition of the federal action or undertaking. In this case, wholly separate wind energy development projects, to the extent they may occur, will not be "caused by" and are not "effects" of the Service's ITP for the R-Project.

1. Wind Energy is Not Properly Part of the ESA Analysis.

Under ESA Section 7, wind energy development is not part of the federal action or an indirect effect of the Service's ITP for the R-Project.[21] The ESA regulations applicable to the Service's determination defined "[e]ffects of the action" to include direct and indirect effects, "together with the effects of *other activities* that are interrelated or interdependent with that action." 50 C.F.R. § 402.02 (2018) (emphasis added), *revised*

[21] Petitioners also raise the specter of wind energy development in their ESA Section 10 claims arguing that NPPD's HCP should have covered whooping cranes in part because of the effects of wind energy development. [#22 at 32]. The scope of an HCP, however, is necessarily limited by the non-federal party's proposed action given that NPPD has no ability to avoid, minimize, or mitigate the impacts of separate private projects over which it has no control. *See* ADD_02560 (HCP Handbook) ("To be eligible for incidental take authorization, covered activities must be: (1) otherwise lawful, (2) non-Federal, and (3) under the direct control of the permittee."). Thus, the fact that some companies may pursue independent wind energy projects has no bearing on whether NPPD met the criteria for issuance of a Section 10 ITP.

by 84 Fed. Reg. 44967 (Aug. 27, 2019).[22] Indirect effects are those "caused by the proposed action" and "later in time, but still . . . reasonably certain to occur." *Id*. And interrelated and interdependent actions are "part of a larger action and depend on the larger action for their justification" or "have no independent utility apart from the action under consideration," respectively. *Id*.

In this case, unspecified wind energy projects that may eventually be built somewhere within a vast swath of north-central Nebraska are neither "caused by" the Service's ITP for an entirely separate transmission project, nor are they reasonably certain to occur. Where the Service's jurisdiction is limited solely to issuing an ITP for the R-Project, the scope of the Section 7 consultation is similarly limited. *See Ctr. for Food Safety v. Vilsack*, 844 F. Supp. 2d 1006, 1020 (N.D. Cal. 2012) (holding the Service's Section 7 consultation obligation is bounded by its jurisdiction), *aff'd,* 718 F.3d 829 (9th Cir. 2013). Whether, how, and where wind energy projects are eventually constructed in Nebraska is wholly independent of the Service's incidental take authorization for the R-Project.

Petitioners cite to no evidence that wind energy projects are part of a "larger action" that will not be built absent the Service's ITP for the R-Project. *See Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd*., 602 F.3d 687, 700-01 (5th Cir. 2010) (rail loop right-of-way to facilitate limestone quarry was not interrelated to future mining phases that might proceed in any case); EMAIL_009112 (explaining that, if the R-Project were not constructed, wind projects would have other options to connect to

[22] The Service explained that the new definition of "effect" was not intended "to alter how [the Service] analyze[s] the effects of a proposed action," but to "simplify the definition while retaining the scope of the assessment." 84 Fed. Reg. at 44976-77.

the grid). Nor do they demonstrate that the R-Project ITP will automatically lead to the construction of those separate projects. A transmission project that "facilitates" or "enables" other activities, as Petitioners describe [#22 at 45-46], is not the same thing as an activity that causes those future activities to occur. *See Wilderness Workshop v. BLM*, 531 F.3d 1220, 1230-31 (10th Cir. 2008) (affirming district court's conclusion that pipeline built with sufficient capacity to "accommodate" future natural gas development did not require analysis of that development in an EIS where gas from new wells would find other means of transport if the pipeline were not built).

The cases cited by Petitioners are unhelpful to them. *See* [#22 at 47] (citing *Sierra Club v. U.S. Dep't of Energy*, 255 F. Supp. 2d 1177 (D. Colo. 2002), *Defs. of Wildlife v. Babbitt*, 130 F. Supp. 2d 121 (D.D.C. 2001), and *Sierra Club v. BLM*, 786 F.3d 1219 (9th Cir. 2015)). In *Department of Energy*, the court determined that the easement granted by the agency had "no purpose other than to provide access to the mine," so that the easement and proposed mine on adjacent land were interrelated for the purpose of ESA Section 7 consultation. 255 F. Supp. at 1188. By contrast, the R-Project has independent utility—it would be constructed regardless of wind energy development to meet reliability needs and reduce grid congestion. Next, *Defenders of Wildlife* is distinguishable because there the agencies artificially constrained the "action area" to federal lands, 130 F. Supp. 2d at 128-30, but here the Service's R-Project ITP BiOp encompassed all of the potentially affected area regardless of land ownership.

Sierra Club v. BLM actually supports the Service's position. The court affirmed BLM's decision *not* to consider the effects of an adjacent wind project as indirect effects of the agency's right-of-way grant over federal land. 786 F.3d at 1225. The court

determined that even though the road had been proposed specifically by the wind developer to serve the project, it could not "be fairly stated that the Road Project caused the Wind Project or brought it into existence." *Id*. Causation is even more attenuated here where the R-Project has not "brought into existence" those separate activities of wind energy development in Nebraska.

Further, other than the Thunderhead Wind Energy Center, it remains entirely speculative whether yet-to-be-defined wind projects will ever be developed in Nebraska and connected to the R-Project. *See Medina Cty*., 602 F.3d at 702 ("substantial degree of certainty" is required to demonstrate a future action is "reasonably certain to occur"); *see also* Consultation Handbook at 4-31. Among the many steps required before a wind project can begin construction are siting studies, land acquisitions, development of interconnection agreements, regulatory approvals, and development of power purchase agreements. LIT_CITED_032746 (FEIS). This process averages four or five years. *Id*. As the Federal Respondents observe [#34 at 32-35], no single project, save the Thunderhead Wind Energy Center, has progressed to the point that it is reasonably certain to occur.[23]

2. Wind Energy Was Appropriately Considered in the NEPA Analysis.

Under NEPA, a "but for" relationship is insufficient to establish that an environmental effect has been "caused by" the federal action. *Dep't of Transp. v. Public*

[23] Even though the Thunderhead Wind Energy Center is "reasonably certain to occur," the layout of its proposed wind turbines is undefined. Thus, site-specific analyses of effects to the American burying beetle and other listed species would not be possible. Section 7_000027-28. It is also not "caused by" the R-Project because Thunderhead could potentially connect to the existing Western Area Power Administration line in Holt County. EMAIL_009112.

Citizen, 541 U.S. 752, 767 (2004). NEPA requires "a reasonably close causal relationship," akin to "proximate cause" under civil law. *Id*. The "rule of reason" "ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Id*. Thus, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency action cannot be considered a legally relevant 'cause' of the effect." *Id*. at 770.

Even if the R-Project may lead to undefined wind energy projects in the region, the ITP is not a legally relevant cause of wind energy development. The chain of causation is too highly attenuated, with numerous intervening factors and decision points determining whether future wind projects by separate project proponents ever proceed. The Service has no authority to permit independent wind projects as part of the R-Project ITP. And the Service cannot deny an ITP based on the effects of independent activities beyond the Service's jurisdiction.

Petitioners' reliance on *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), is misplaced. There, the court held that the agency's approval of a natural gas pipeline, the sole purpose of which was transporting natural gas to an existing power plant, should consider the impacts of the eventual combustion of that natural gas for power production. *Id.* at 2373. But the R-Project is not being constructed for the sole purpose of facilitating the Thunderhead Wind Energy Center or any other undefined wind energy project. The R-Project would be constructed to address critical reliability and congestion needs regardless of renewable energy prospects in the region.

Moreover, *Sierra Club* was recently questioned by the Eleventh Circuit in *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288 (11th Cir. 2019). In that case, plaintiffs complained that the Corps had not taken a hard look at the indirect effects of a Corps' discharge permit for a phosphate mine. Plaintiffs alleged that the environmental effects of producing and storing phosphogypsum, a byproduct of the eventual fertilizer manufacturing process from the mined phosphate, should have been considered as an indirect effect of the discharge permit for the mine. *Id*. at 1292.

The Eleventh Circuit, relying on *Public Citizen*, disagreed. "[I]t is pointless to require agencies to consider information they have no power to act on, or effects they have no power to prevent." *Id*. at 1297. "NEPA does not stretch this far." *Id*. at 1295. For the Phosphate mine discharge permit there, the Corps did not issue the mining permit, or permit the production of fertilizer from the phosphate, or regulate the storage and disposal of phosphogypsum. "Given this tenuous causal chain, it was sensible for the Corps to draw the line at the reaches of its own jurisdiction." *Id*. at 1295. "The rule of reason turns, at least in part, on the agency's statutory authority, not on what outcomes an agency might achieve through indirect coercion." *Id*. at 1297.

Similarly here, the Service did not authorize, and has no jurisdiction to authorize, the R-Project or separate wind projects. Petitioners improperly attempt to "appoint the [Service] de facto environmental-policy czar." *Id.* at 1299. But the Service is limited to the confines of its statutory authority. And NEPA cannot authorize the impermissible expansion of that authority beyond ITP permit issuance. *Nat. Res. Def. Council v. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988). In sum, and as the Federal Respondents explain,

the Service did not ignore potential impacts of wind energy development but addressed those in the cumulative impact analysis. [#34 at 46-49]. This approach satisfied NEPA.

3. Wind Energy is Not Properly Part of the NHPA Analysis.

Wind energy development is not part of the federal "undertaking" and is therefore beyond the scope of the NHPA Section 106 consultation. Section 106 requires federal agencies to "take into account the effect of [a federal] undertaking on any historic property." 54 U.S.C. §§ 306108, 300308.

The first step in the NHPA process is to define the area of potential effects or APE—the area "within which *an undertaking* may directly or indirectly cause alterations in the character or use of historic properties." 36 C.F.R. §§ 800.4(a)(1), 800.16(d) (emphasis added). "The [APE] is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by and undertaking." *Id*. § 800.16(d).

To define the APE, the agency must first define the scope of the federal undertaking. The undertaking, and by extension the APE, need not encompass actions that the agency does not "initiate, approve funds for or otherwise control." *Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989)*; see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 32 (D.D.C. 2016) (Section 106 "does not require that the Corps consider the effects of actions over which it has no control and which are far removed from its permitting activity"). Agencies are granted substantial discretion in defining the APE. *Coal. of Concerned Citizens to Make Art Smart v. U.S. Dep't of Transp*., 843 F.3d 886, 906 (10th Cir. 2016).

The federal undertaking here is the Service's ITP for the R-Project. As noted, the Service does not have general permitting authority over the R-Project itself, let alone

wholly separate wind energy development projects. Thus, the Service's definition of the direct APE as encompassing the area of project ground-disturbance, and the indirect APE as the R-Project viewshed (the area within 10 miles of the R-Project), was sufficiently broad to capture the effects to historic properties. NHPA_000558. While the Programmatic Agreement acknowledged that the Thunderhead Wind Energy Center is reasonably foreseeable, the State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation determined that Section 106 did not require further consultation regarding this separate project. NHPA_000545. This is consistent with Section 106's purpose to ensure consultation and resolution of effects to historic properties caused by "the undertaking" itself.

F. The Service Met Its NHPA Section 106 Obligations to Identify Potentially Affected Historic Properties.

Petitioners claim that the Service violated the NHPA by deferring final cultural resource surveys within the area of potential effect before granting the ITP. [#22 at 52]. The NHPA regulations, however, specifically allow for "phased identification" of historic properties "where access to properties is restricted" and where provided for in a programmatic agreement. 36 C.F.R. § 800.4(b)(2). Here, because access could not be obtained to all the private parcels along the R-Project route, the Programmatic Agreement provides for phased review. NHPA_000545. Regardless, Petitioners fail to mention that 93% of the Project corridor has been surveyed already and that any remaining surveys will be completed prior to construction in those areas. *Id*. NPPD and the Nebraska SHPO will agree to an appropriate treatment of any discovered resources prior to resumption of construction activities in any area of discovery. NHPA_000548. This approach complies with the NHPA.

Petitioners' reliance on *Oglala Sioux v. Nuclear Regulatory Commission*, 896 F.3d 520 (D.C. Cir. 2018), is misplaced. There the court had held that the Nuclear Regulatory Commission violated NEPA by failing to identify or assess impacts to cultural resources. *Id.* at 533. In considering an appropriate remedy, the court determined that it could not allow the project permit to stand and work on the project to commence. By contrast here the parties signed a programmatic agreement, 93% of survey work has been complete, the EIS includes a robust discussion of the impacts to cultural resources and historic properties, and all remaining surveys will be completed and the SHPO consulted regarding appropriate avoidance, minimization, and mitigation measures before construction in the affected areas.

G. Petitioners Have Not Demonstrated that They Are Entitled to Their Requested Remedy.

As shown above, Petitioners cannot prove their case. The Petition for Review should be denied. Nevertheless, if the Court identifies an error in the Service's decisionmaking, the Court should remand the issue to the Service without vacating the ITP. Petitioners did not present an argument on remedy, perhaps assuming—incorrectly—that vacatur is an automatic remedy. Because Petitioners have not "adequately briefed" the issue, it may be deemed waived. *See Petrella v. Brownback*, 787 F.3d 1242, 1260 (10th Cir. 2015); *Corsentino v. Hub Int'l Ins. Servs., Inc.*, No. 16-cv-01917-RM-STV, Order dated Mar. 7, 2018 (D. Colo.) (applying the waiver rule to bar an argument where the issue included several elements, and the party did not brief the elements).

Courts in this district have routinely held that the Administrative Procedure Act "does not . . . deprive reviewing courts of traditional equitable powers when fashioning a

remedy." *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1263 (D. Colo. 2014) (citing 5 U.S.C. § 702). To determine the appropriate remedy, courts have "weigh[ed] the severity of the legal violation against the potential negative effects of vacatur." *Id*. at 1264 (citation omitted). Here, if any error is found, the balance argues in favor of remand without vacatur.

Stripped of the Petitioners' overreach, the case against the Service's permit is, at most, assertions of procedural errors. The Court must weigh any possible procedural flaws against the real and immediate harm of vacatur. As documented in the record and SPP's evaluations, Nebraska electrical customers need the R-Project to ensure grid reliability. Indeed, the SPP, which is charged with maintaining grid reliability, determined that they needed the R-Project by January 2018. LIT_CITED_032215 (FEIS).

Loss of reliable electrical service is the kind of disruption that courts have found should be prevented by remanding without vacating. For example, in *California Communities Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012), the Ninth Circuit found that the risk of blackouts and additional air pollution due to the use of diesel generators should be avoided by remanding without vacating. *Id.* at 993-94; *see also Nat'l Parks Conservation Ass'n v. Semonite*, 2019 WL 5864737, *7 (D.D.C. Nov. 18, 2019) ("[T]he hundreds of thousands of people in the region relying on this project as their power source would be the ones who face the greatest consequences. It would be unjust to force all those people to bear the brunt of the harm when they are not responsible for its cause.").

So too here. NPPD and the SPP began planning and permitting for the R-Project years before the projected need. However, due to the lengthy permitting process the Project is now overdue, and NPPD's customers and others in the region suffer the risk of power disruption. It would be unjust to force on them additional delays because of any procedural error in the Service's ITP permitting, if so found by the Court. If the Court finds that the Service erred, the Court then should remand without vacatur to allow the agency to resolve the error without further delaying this needed electrical transmission infrastructure for Nebraska and the region.

V. Conclusion

For the above reasons and those in the Federal Respondents' brief [#34], the Petition for Review should be denied.

Respectfully submitted this 20th day of December, 2019.

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Certificate of Word Count

I hereby certify that the preceding memorandum, exclusive of the caption page, tables, signature block, and certifications, contains 13,349 words, in compliance with the Court's August 14, 2019 Scheduling Order [#11] setting a limit of 13,500 words for Intervenor-Respondent NPPD.

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Certificate of Service

I hereby certify that on December 20, 2019, I have caused the foregoing to be electronically filed with the Clerk of Court using CM/ECF system, which will send notification of such filing to the following addresses:

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